

## **Hostile Workplace Continuing Violation OK, But Not for Discrete Acts, High Court Rules**

The U.S. Supreme Court ruled unanimously June 10 that the continuing violation doctrine does not apply to claims for discrete acts of employment discrimination, but decided 5-4 that the doctrine can apply in hostile environment claims (*National R.R. Passenger Corp. v. Morgan*, U.S., No. 00-1614, 6/10/02).

Rejecting a portion of a U.S. Court of Appeals for the Ninth Circuit decision that allowed Abner Morgan to include several years of alleged discriminatory actions by the National Railroad Passenger Corp. (Amtrak) in his Title VII of the 1964 Civil Rights Act complaint, despite the untimeliness of many of the actions, the court found the statutory definition of "unlawful employment practice" relates to discrete acts, and therefore could not be linked together under a continuing violation doctrine.

The court's opinion by Justice Clarence Thomas rejected Morgan's argument that "practice" connotes an ongoing violation that can occur or recur over a period of time. Finding that 42 U.S. Code Section 2000e-2 details numerous discrete actions as part of the explanation of "[u]nlawful employment practices," the court said there was "simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of a timely filing."

### **Incidents Occurred Over Six Years**

Morgan allegedly faced racially tinged experiences soon after he began work in 1990 and was terminated after only six months for refusing to meet with two managers. Morgan grieved and was reinstated after a 10-day suspension. Until his eventual termination in 1995, Morgan continued to have conflicts at Amtrak, once resulting in a meeting with his representative in Congress and in the intervention of Amtrak's inspector general. The conflicts included numerous disciplinary actions for absenteeism and tardiness, most of which were dismissed after grievances were filed. Morgan also alleged bias in managers' failure to assign him to training programs and in their orders to perform work outside of his electrician helper job description. Morgan took all of his complaints to Amtrak's EEO office.

Morgan filed his EEOC charge in February 1995, but the trial court ruled that claims based on conduct prior to May 1994 were untimely. The Ninth Circuit rejected the trial court's "reasonable knowledge approach," ruling that "this

court has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine."

The Ninth Circuit ruled that to show a continuing violation, a plaintiff must demonstrate either a serial violation, a series of related acts one or more of which are within the limitations period, or a systemic violation, a systemic policy or practice of discrimination that operated in part within the limitations period (232 F.3d 1008, 84 FEP Cases 225 (9th Cir. 2000) (38 GERR 1314, 11/28/00)).

### **Biased Acts vs. Hostile Environment**

The Supreme Court, however, found that "practice" relates to discrete acts. It explained that a similar interpretation of "practice" was applied in *Bazemore v. Friday*, 478 U.S. 385, 41 FEP Cases 92 (1986), where each paycheck was actionable as a new Title VII violation, and in *Delaware State Coll. v. Ricks*, 449 U.S. 250, 24 FEP Cases 827 (1980), where the court found the "mere continuity of employment" was not enough to create a continuing violation. The court explained that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Each discrete act "starts a new clock for filing charges" and plaintiffs cannot string together related discrete acts that fall both inside and outside the filing period. A narrower majority of the court ruled that the holding did not apply to hostile environment cases. A hostile environment claim necessarily "involves repeated acts of conduct," the 5-4 majority said. The environment develops "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

"It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period," the court said. "Provided that an act contributing to the claim occurs within the filing period, the entire period of the hostile environment may be considered by a court," the justices ruled.

### **Two-Year Back Pay Rule**

The court noted that Title VII does not bar damages for portions of the hostile environment that fall outside the filing period. Because timeliness does not control recovery, the court said it was merely one in a series of provisions compelling parties to act within a specific time period, but did not function as a limitation on damages. "If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay," the court reasoned.

The court emphasized that employers are not left "defenseless" against hostile environment claims extending over long periods of time because they still have recourse to a laches defense.

Thomas was joined in Part II of the decision by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen Breyer.

In a concurring opinion joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy, and Breyer, Justice Sandra Day O'Connor said the majority opinion left unclear a "discovery rule" question regarding when a plaintiff needs to file a charge. While the majority said the equitable doctrines of estoppel and tolling could alter when the time limits begin tolling, the concurrence emphasized that "some version of the discovery rule applies to discrete-act cases" and that the charge-filing period precludes recovery based on discrete actions that occurred after the employee had, or should have had, notice of the discriminatory act.

### **Dissent: Plaintiffs May Sleep on Their Rights**

O'Connor was joined by Rehnquist, Scalia, and Kennedy in dissenting on the hostile work environment part of the decision.

"Although a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate 'occurrence,' and claims based on some of these occurrences forfeited," the dissent argued.

Treating hostile environment claims as a single occurrence contradicts the policies behind Section 2000e-5(e)(1) and creates statute of limitations problems when plaintiffs "sleep on [their] rights" for an extended period of time, the dissent stated.

While recognizing that the two-year limitation on back pay addresses some of these concerns, other liability may be assessed based on long-past occurrences, the dissent said. In addition, O'Connor said that limiting actions to the EEOC time periods would not serve as a damages cap and that two years of back pay would "sometimes be available even under my view."

### **Attorneys React to Ruling**

Morgan's attorney, Pamela Y. Price of Price and Associates in Oakland, Calif., told BNA June 10 that she was disappointed with the ruling as it related to discrete claims and said it would force employees to file multiple charges with EEOC out of fear that the time limitations would jeopardize a claim.

"Employers may soon regret what they asked for because the ruling means employees and their attorneys will be forced to file multiple charges, each with its own \$300,000 cap, instead of waiting until there is a pattern and practice," Price said. The decision also appears to undermine internal EEO efforts, Price added, because an employee can no longer wait for the resolution of the EEO process before filing a charge because a lengthy investigation could mean that they missed the charge-filing deadline.

Roy T. Englert of Robbins, Russell, Englert, Orseck & Untereiner in Washington, D.C., who argued on behalf of Amtrak, told BNA that the decision still left open questions about the use of the term "continuing violation doctrine" and whether it resolved the circuit split involving hostile environment claims.

Ann Elizabeth Reesman of the Equal Employment Advisory Council in Washington, D.C., called the decision "a lawyer's case" and said many questions, especially when applied to hostile environment cases, would ultimately be resolved on evidentiary issues. "The court didn't open the door to everything that has happened over an entire career," Reesman said. "It really is not a broad ruling and I believe many defense attorneys will be able to interpret it narrowly." EEAC filed an amicus brief along with the U.S. Chamber of Commerce on behalf of Amtrak.